



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**COLEMAN v. CITY OF MESA, et al.
CV-11-0351-PR**

PARTIES:

Petitioners: Defendants/Appellees City of Mesa; Mesa City Council; Scott Smith, Mayor; Linda Crocker, City Clerk; Kyle Jones, Vice Mayor and City Council Member; and Alex Finter, Dina Higgins, Dennis Kavanaugh, Dave Richins, and Scott Somers, City Council Members (collectively, “the City”)

Respondents: Plaintiffs/Appellants Ryan and Laetitia Coleman (“the Colemans”)

FACTS:

The Colemans applied to the City for a permit to open a tattoo parlor at a strip mall. To obtain a permit, the City requires certain businesses, including tattoo parlors, among other things, to be “compatible” with surrounding uses. The City’s Planning and Zoning Board staff reviewed the Colemans’ application and recommended approval, subject to several conditions with which the Colemans agreed to comply. The staff specifically found the use conformed with the City’s zoning code, distance requirements, and City plans and policies, and that no likely issues with crime were presented. Nonetheless, the Board recommended denial of the permit, finding the use was not “appropriate” to the neighborhood and was not the best use of the property. After listening to public comments, the City Council denied the permit, making no formal findings.

The Colemans filed a complaint against the City alleging violations of their free speech, equal protection, and due process rights under the United States and Arizona Constitutions. The City moved to dismiss, asserting the denial of the permit was a rational exercise of its zoning powers. The superior court judge granted the motion to dismiss, finding the Council’s decision “was a reasonable and rational” regulation of land use “based upon community concerns.”

The Colemans appealed, arguing the City violated their freedom of speech, equal protection, and due process rights under the federal and state constitutions. The City, in turn, asserted the superior court correctly applied a rational basis review. Further, even if tattooing is a speech-protected activity, the City claimed it satisfied intermediate scrutiny, as even protected activities are subject to reasonable time, place, and manner restrictions. The City Council properly considered the surrounding neighborhood and citizens’ opinion.

The court of appeals reversed, finding the factual record was insufficient to support the superior court’s dismissal. The appellate court disagreed with courts in other jurisdictions, which have found that “the process of tattooing is conduct without an expressive component and therefore is not entitled to protection under the First Amendment” to the federal constitution. Rather, the court in this case concluded tattoos are “pure speech,” entitled to full constitutional protection because “[t]he sole purpose of a tattoo is to communicate thoughts, emotions, or ideas

as rendered by the tattoo artist.” Because tattoos are pure speech, the act of tattooing and the business of tattooing also constitute pure speech rather than conduct, and they are subject only to reasonable time, place, or manner restrictions by the government.

Applying intermediate scrutiny, the court explained that the superior court, on remand, will have to determine whether the City imposed a permissible time, place, or manner restriction on the Colemans’ operation of a tattoo parlor. Such government restrictions on protected speech are permissible if they are “justified without reference to the content of the regulated speech,” are “narrowly tailored to serve a significant governmental interest,” and “leave open ample alternative channels for communication of the information.”

The court found the City failed to establish the Colemans would not be able to show that the City could have reached its legitimate zoning goals by granting the permit with the restrictions its staff recommended. The City cannot constitutionally deny a permit for a tattoo parlor based only on neighborhood hostility born from perceptions about tattoo parlors that may or may not be accurate. Moreover, nothing in the record revealed what, if anything, guided the Council’s discretion in making its compatibility decision.

The court also could not conclude as a matter of law that the City’s decision left open enough other ways for the Colemans to operate a tattoo parlor in Mesa. If the City is able to deny a permit application based only on negative perceptions about tattoo parlors, or the City does not explain how it determined neighborhood compatibility, the Colemans cannot practically know where to properly locate within Mesa without expending time and possibly money to find and arrange for a new site, which the City may or may not deem “compatible” with the neighborhood, despite compliance with other criteria listed in the ordinance. Any alternative must permit the Colemans to obtain a permit without incurring unreasonable costs of time or money that dissuade them from operating in the City.

Next, the court addressed the Colemans’ equal protection claim. If the City’s ordinance “substantially burdens” the Colemans’ constitutional free-speech guarantees, the provision can withstand the equal protection challenge only under a strict scrutiny analysis. That means the City would bear the burden of showing that its ordinance is narrowly drawn to further a compelling government interest that outweighs the Colemans’ free-speech interests. The court found the Colemans sufficiently stated a claim for an equal protection violation by asserting the City treats tattoo parlors differently than other businesses based on unfounded perceptions and stereotypes. The slim record supporting the motion to dismiss failed to identify the City’s interests or demonstrate that the City Code provision is narrowly tailored to achieve those interests.

Finally, the court addressed the Colemans’ claim that the superior court erred by dismissing the claim that the City violated their state and federal substantive due process rights because (1) the City’s “planning and zoning code approval criteria,” facially and as applied, did not sufficiently guide the Council’s discretion, (2) the Council’s decision was based on perception rather than fact, and (3) the Council acted unfairly. Because engaging in the business of tattooing is a fundamental right, the superior court had to apply a strict scrutiny analysis to decide whether the City Code provision serves a compelling government interest and is narrowly tailored to achieve that interest. This analysis is essentially the same as the one used to address

the Colemans' equal protection claim. Thus, the Colemans stated a substantive due process claim sufficient to withstand the motion to dismiss. Because development of a factual record is warranted, the superior court erred by dismissing the Colemans' claims.

ISSUE:

Whether obtaining a tattoo, applying a tattoo, and the business of tattooing are all “pure speech . . . entitled to the highest level of protection by Article 2, Section 6 of the Arizona Constitution and the First Amendment to the United States Constitution.”

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